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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/843,621	04/26/2001	Jerry Prismantas	060783/P001US/10120272	7677

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DALLAS OFFICE OF FULBRIGHT & JAWORSKI L.L.P.  
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EXAMINER
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MOORE JR, MICHAEL J

ART UNIT	PAPER NUMBER
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2616

MAIL DATE	DELIVERY MODE
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03/19/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

09/843,621

Applicant(s)

PRISMANTAS ET AL.

Examiner

Michael J. Moore, Jr.

Art Unit

2616

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 29 January 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: 20-29, 35 and 37.  
Claim(s) objected to: 32, 33 and 36.  
Claim(s) rejected: 1, 3, 5-19 and 31.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_  
13. ☐ Other: \_\_\_\_\_.

Michael J. Moore, Jr. **MM**  
Examiner  
AU 2616

Continuation of 11. does NOT place the application in condition for allowance because:

As an initial matter, Applicant argues that the finality of the previous Office Action is improper because Applicant did not receive a full and fair opportunity to respond to the rejection of record. However, it is pointed out by Examiner that it is not required Office practice to provide applicants with a copy of provisional applications or to use a non-published provisional application in a rejection rather than the corresponding published U.S. Patent or publication. While these provisional applications are non-published, they are publicly available to applicants and can be attained from the Office upon request by applicants. Typically, when applying a rejection under 35 USC 102(e) using a published reference claiming priority under 35 USC 119(e) to a provisional application, the examiner verifies that support is provided in the provisional application, and then applies the rejection using the published reference. Upon receiving the Office Action, Applicant may challenge the prior art date of the published reference by referring to the provisional application and providing proof to the Office of lack of support in the Response to Office Action. Therefore, it is held that the finality of the previous Office Action is proper.

Secondly, after further consideration, the amendment to claim 1 incorporating the limitations of now cancelled claim 4 is proper and has been entered. However, amended claim 1 is still held rejected for the reasons provided in the Final Office Action pertaining to claims 1 and 4.

Regarding amended claim 1, Applicant argues that Howard does not teach "wherein said scheduling means includes means for shifting a time sequence of said RF data transfer to avoid said interference". Applicant further argues that not scheduling a transmission is not the same as shifting a time sequence of RF data transfer to avoid interference as claimed.

However, as previously provided, Howard teaches the avoidance of interference by not scheduling any upstream transmissions during intervals where the interference is present as spoken of on column 13, lines 37-50. Since shifting of data is interpreted to mean "To move or transfer data from one place or position to another", and since Howard avoids interference by scheduling (shifting) a data transfer in a time interval without interference rather than in a time interval with interference (moving of data transfer from one time interval to another time interval), it is held that Howard teaches the shifting of a time sequence of RF data transfer to avoid interference.

Regarding claim 12, Applicant argues that the RF Impairment Detector and Classifier 220 of Howard (U.S. 7,024,680) is not a filter as set forth in the claims, and is not swept across an RF band of interest. However, no further definition of "a filter" is provided in claim 12. According to the claim language, "a filter" is used to detect interference. As provided in the previous Office Action, the RF Impairment Detector and Classifier 220 (filter) of Figure 2 identifies RF impairments (detects interference) on the upstream channel (RF band of interest) by examining FEC errors, FFT output data, and time sample data (sweeping across the RF band of interest) as spoken of on column 6, lines 26-31 and 59-67. It is therefore held that Howard anticipates this claim.

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